KIM SENG HOTEL AND COFFEE SHOP v. CHUAH TEONG BUAN

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) January 18, 1971]

[Ipoh — Federal Court Civil Appeal No. 57 of 1970]

Practice and Procedure — Application for leave to sign final judgment — Triable issue — Leave to defend.

Landlord and Tenant — Recovery of possession — Bona fide triable issue.

The respondent, the landlord of the premises, had brought an action for possession against the appellant. The writ in the action was specially indorsed and the respondent had applied for leave to sign judgment. The appellant's case was that he was not only a tenant but also holder of an irrevocable licence coupled with an interest in the premises. The claim was based on the allegation that in consideration of his expending moneys on major alterations and additions to the premises, the respondent had orally agreed not to terminate the tenancy as long as rent continued to be paid. The respondent admitted receipt of the sum of $20,000 but alleged that it was a payment by way of premium only. The senior assistant registrar gave the appellant unconditional leave to defend but on appeal this decision was reversed and an order made that the respondent do recover possession of the premises. On appeal to the Federal Court,

Held, allowing the appeal: there was a *bona fide* triable issue to be determined in this case and therefore the appellant should be given unconditional leave to defend.

Cases referred to:-

(1) *Hughes* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. 439, 448.

(2) *D. & C. Builders* v. *Rees* [1966] 2 Q.B. 617, 624.

(3) *Hajara Singh* v. *Muthukaruppan & Ors.* [1967] 1 M.L.J. 167.

(4) *Jacobs* v. *Booth's Distillery Co.* (1901) 85 L.T.R. (N.S.) 262.

(5) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129.

(6) *Gregory* v. *Mighell* (1811), 18 Ves. 328; 34 E.R. 341.

(7) *Pilling* v. *Armitage* (1805), 12 Ves. 78; 33 E.R. 31.

(8) *Jones* v. *Stone* [1894] A.C. 122.

FEDERAL COURT.

Dato S. P. Seenivasagam for the appellant.

M. Sivalingam for the respondent.

Ong C.J. (Malaya): Since October 1, 1951 the appellant was a monthly tenant of premises No. 145, Jalan Kota Taiping, let to him under an agreement in writing which provided that, so long as he paid the rent reserved and observed the several covenants and stipulations therein contained, he should peacefully hold and enjoy the demised premises during his tenancy, but that if the rents should be unpaid for 14 days or if any of the covenants on his part should not be performed or observed then "it shall be lawful for the landlord at any time thereafter to re-enter upon the premises... and thereupon this tenancy shall absolutely determine...".

The monthly rent initially was $250, which had been raised to $315 at the commencement of this action. The respondent landlord claimed repossession of the premises, not on the ground of any default by his tenant, but merely on the ground that by notice to quit he had duly terminated the tenancy. The writ in the action was specially indorsed and upon application by the respondent for leave to sign judgment, the appellant was granted unconditional leave to defend. This decision of the senior assistant registrar was reversed by the judge on appeal and an order made that the respondent do recover possession of the premises. This is an appeal against such order.

The appeallant's case is that he was not only a tenant but also holder of an irrevocable licence coupled with an interest in the premises. This claim was based on the allegation that, in consideration of his expending moneys on major alterations and additions to the premises — for the purpose of a hotel and coffee-shop — and paying the respondent, in addition to the stipulated rent, a further sum of $20,000 by instalments, the respondent had orally agreed that he would not terminate the tenancy so long as rent continued to be paid. The respondent by his affidavit admitted receiving full payment of this sum of $20,000 over a period of approximately 6 years, but denied the parole agreement or promise as alleged. This large sum, he said, was a payment by way of premium and not as consideration for a promise not to determine the monthly tenancy so long as rent was promptly paid.

When the issue is thus stated, I think it is reasonably clear that there is a *bona fide* triable issue to be determined, not merely by the perusal of evidence on affidavits, but also requiring assessment of the credibility of witnesses to be seen and heard by the trial judge in open court. The question of fact is: what was the agreement involving payment of the $20,000? Facts are so infinite in their variety that, in my view, precedents can be of little or no real assistance in this case. Should it be held, in favour of the respondent, that the payment was by way of premium, then a finding of fact to that effect will naturally dispose of the matter. On the other hand, it cannot be ruled out that possibly the appellant, by himself or with the support of credible witnesses, may be able to persuade the trial judge to hold that there was a promise given by the respondent not to interrupt or disturb his tenant in the peaceful enjoyment of the premises so long as he observed all the terms and conditions of his tenancy, including the prompt payment of rent. If so, then and only then other questions will arise for further determination, whether or not equity will "stretch out a merciful hand" to assist the tenant who had expended no small sum on the faith of a promise that he will be left in undisturbed possession: see *Hughes* v. *Metropolitan Railway Co.*(1) and *D. & C. Builders* v. *Rees.*(2)

In passing, I venture to express the view that the alleged parole agreement, if proved, will not be excluded by the provisions of sections 91 and 92 of the Evidence Ordinance, neither does it in any way conflict with the provisions of the National Land Code.

I would allow this appeal and order that the costs of and incidental to the application before the senior assistant registrar, as well as the appeal from his decision, be costs in the cause.

Gill F.J.: I am also of the opinion that this appeal should be allowed. It has been held by the courts again and again that a defendant must be given unconditional leave to defend unless it is clear that there is no substantial question to be tried or that there is no

dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.

In the present case, the defendant in his affidavit in opposing the plaintiff's application for summary judgment has raised issues which can only be determined by *viva voce* evidence at the trial of the action, and he has set up a defence of which it cannot possibly be said in unequivocal terms that it is not *prima facie* sustainable.

Ali F.J.: This appeal involves the consideration of the question whether or not the appellant is entitled to leave to defend the action against him. The plaintiff commenced action by a writ specially indorsed with a claim for possession of premises let out to the appellant on monthly tenancy. The application for summary judgment came before the registrar who gave the appellant unconditional leave to defend. This was reversed on appeal by the High Court judge who granted the landlord leave to sign final judgment The appellant has now appealed to this court.

So far as the question or questions for present consideration fall to be decided on the affidavits filed by the respective parties, I shall confine myself only to the matters set out therein. As usual the landlord has filed an affidavit verifying his cause of action and stating the belief that the tenant has no *bona fide* defence and that appearance entered was merely for the purpose of delay. On the pleadings the landlord's case is a straightforward claim for possession of premises following the termination of the tenancy by a notice to quit. It was common ground between the parties that the premises in question is not rent controlled. This means that the landlord's common law right to possession is not restricted by any statute and the appellant cannot, therefore, seek protection of any rent control legislation. However, he sought to resist summary judgment on the ground that the landlord is bound by an oral agreement not to terminate the tenancy except for non-payment of rent. In paragraph 3 of his affidavit the ground is stated in the following terms:

"3. In consideration of my making major alterations and additions to the said premises and paying him $20,000, the plaintiff agreed that he would not terminate my tenancy for so long as I continued to pay rent."

The learned High Court Judge has taken the view that in terms stated, the oral agreement was void for uncertainty. Why this was so is not stated in the judgment. But the decision in *Hajara Singh* v. *Muthukaruppan & Ors.*[3] was regarded a binding authority on the court. But the decision in that case seemed to have turned on a different set of facts. Barakbah L.P. (as he then was) had said this:

"The expression 'for so long as he wished during his lifetime', in my view, connotes uncertainty and the agreement is therefore void."

The same view cannot be taken on the facts of the present case simply because the parties to the oral agreement had not used a similar expression. With respect I am unable to agree that the decision in *Hajara Singh's* case is a binding authority on the court. Paragraph 3 of the affidavit in terms suggests that the landlord has orally agreed that he will not exercise his common law right to possession by terminating the tenancy and that he is entitled to do so only when the tenant defaults in the payment of the monthly rent. Assuming that the oral agreement exists and that the landlord is guilty of a breach, would he, the tenant, be entitled to judgment? The question will have to be answered by the trial court on the merits of the arguments. We are not here to consider the merits. (See *Jacobs* v. *Booth's Distillery Company.*[4]) Thus on his affidavit the appellant seems to have reasonable defence. It might well be that a view has been taken that the effect of the oral agreement was to make what was a monthly tenancy into a perpetual lease contrary to statutory provision which requires such leases to be in writing. But that cannot be. The provision requiring the tenant to continue paying his monthly rent in order to remain in occupation clearly suggests an intention to continue with the monthly tenancy. Accordingly, I am unable to accept the view that the oral agreement in terms stated in the tenant's affidavit was void for uncertainty. On the other hand, and I say no more than this, the appellant's affidavit sufficiently discloses that he has a *bona fide* defence in the action. He may fail at the trial but that is not for us to decide.

As regards the admissibility of the oral agreement, there seems to be some doubt. I think the question will have to be considered here so that if it appears that the oral agreement is clearly to be excluded by section 92 of the Evidence Ordinance, it would be pointless to let this matter go to trial. The oral agreement would be excluded if it has the tendency to contradict, vary, add to or subtract from the terms of any written agreement. The written agreement in this case contains the usual covenant whereby the tenant undertakes to pay a specific amount as the monthly rent on a specific date. It also contains a covenant that when the tenant defaults in the payment of the rent, the landlord is entitled to re-enter or terminate the tenancy. All other covenants in the agreement do not require consideration here. As it seems to me the oral agreement in this case does no more than require a tenant to observe his covenant in the written agreement if he wishes to remain in occupation. To that extent it seems consistent with the written agreement within the meaning of proviso (b) of section 92. The landlord may possibly raise this point again if this case goes to trial but for the present I am not convinced that the oral agreement is inadmissible as evidence.

Lastly, the appellant has contended that by reason of the payment of $20,000 and also of the payment of $2,250 as expenditure for altering and making additions to the premises, he has acquired an irrevocable licence. He alleged that the landlord knew and had consented to the said expenditure. The landlord has denied the allegations except that according to him the $20,000 was paid towards premiums. The dispute on the facts, such as it was, will undoubtedly be considered and decided by the trial court. Until then, it is not possible to express any definite view on the appellant's contention. The learned High Court Judge, however, has expressed the view that the contention is without merit. He so held because of the judgment

of Lord Kingsdown in *Ramsden* v. *Dyson*.[5] If I may say so, after reading the judgment in that case, the rule propounded by Lord Kingsdown seems to have been expressed in the alternative. On the one hand, he said on page 170:

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*,[6] and, as I conceive, is open to no doubt."

On the other hand he continued —

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Pilling* v. *Armitage*,[7] and, like the decision in *Gregory* v. *Mighell*, seems founded on plain rules of reason and justice."

Having thus stated the rule, he went on to say:

"The whole question, I think, in this case, is, within which class does the present claim fall; a point which, of course, depends entirely on the effect of the evidence."

Clearly, therefore, until a decision on the evidence is reached in this case it is not possible to say within which class the appellant's claim would fall.

In all the circumstances of this case so far as these are ascertainable from the affidavits, the appellant has shown that for the purpose of Order 14, he has a case to go to trial. The principle under this order has been stated in numerous cases of which *Jacob* v. *Booth's Distillery Company, supra*, is in the forefront I do not propose to refer to them except to recall the words of Lord Halsbury in *Jones* v. *Stone*[8] on page 124 as follows:

"The proceeding established by that order" (Order 14) "is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purpose of delay."

On the affidavits it is impossible to say that the landlord is clearly entitled to judgment.

Accordingly, I would allow this appeal with costs to be in the cause. There will also be an order that the appellant files his defence within two weeks from today.

Appeal allowed.

Solicitors: *S. Seenivasagam & Sons; Lim Cheng Ean & Co.*

PRIVY COUNCIL REPORT

RAMOO v. GAN SOO SWEE & ANOR.

[P.C. (Lord Hodson, Lord Wilberforce and Lord Cross of Chelsea) May 4, 1971]

[Privy Council Appeal No. 22 of 1969]

Negligence — Highway — Junction controlled by traffic lights — Defective lights — Collision — Duty of care.

Damages — Negligence — Personal injuries — Apportionment of liability — When varied.

This was an appeal against the decision of the Federal Court ([1969] 1 M.L.J. 59), reversing the decision of the High Court ([1968] 2 M.L.J. 66) in a claim for damages for personal injuries sustained in a collision between a taxi and a lorry. The collision occurred at a junction controlled by traffic lights which at the relevant time appeared to be defective.

Buttrose J. in the High Court found that the traffic lights were defective but held that the respective drivers of the taxi and the lorry were aware of this. He apportioned the blame at 75% on the lorry driver and 25% on the taxi driver.

The Federal Court, setting aside the finding of Buttrose J., held that there was no evidence that either the driver of the lorry or the taxi knew that the traffic lights were defective and that in the circumstances, the plaintiff had failed to prove that either or both the drivers were negligent. The plaintiff (respondent) appealed to the Privy Council.

The crucial question to be decided was whether either the taxi driver or the lorry driver or both of them should have realised that the lights were out of order and whatever colour they might happen to be when they passed them, it was their duty to proceed with caution because of the possibility that a vehicle might enter the crossing from the other road at the same time.

Held, allowing the appeal: (1) according to the evidence, the traffic lights facing the taxi driver were changing colour very quickly; he was driving down a straight road; and there was nothing to obstruct his view of the lights. If he had been keeping a proper look-out he would — one would suppose — have realized that the lights were out of order and have slowed down at the crossing — but in fact he continued to drive on to the crossing at about 40 miles an hour. In the absence of any evidence from him as to when he first saw the lights and what impression they made on him, the natural inference is that he was not keeping a proper look-out and that his failure to keep a proper look-out caused or contributed to the accident;

(2) the plaintiff (appellant) was a passenger who was under no duty to keep the lights under observation;

(3) the plaintiff was under no duty to adduce evidence to the effect that the lights were changing so quickly that the taxi driver, if he was keeping a proper look-out, must have realized that they were not functioning properly, in order to succeed;

(4) the trial judge was justified in holding not only that the lorry driver was not keeping a proper look-out, but that on the balance of probability his failure to do so was a contributory cause of the accident;

(5) that only in exceptional circumstances will an appellate court be justified in interfering with an apportionment of liability made by the trial judge. Such circumstances do not exist here.

[Editorial Note: It is interesting to note that in *Ngui Kee Siong* v. *Guan Soo Swee & Anor.* [1970] 2 M.L.J. 46, a case which arose out of the same accident, Winslow J. found both the taxi driver and the lorry driver negligent and apportioned liability to the extent of 1/3 and 2/3 respectively, and awarded $27,000 as general damages.]